STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2007
v	No. 267299 Oakland Circuit Court
GREG ALLEN WINER, Defendant-Appellant.	LC No. 2004-195538-FC

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (sexual penetration with a person under 13 years of age) and three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age), for sexually assaulting his then nine-year-old stepdaughter. The trial court sentenced defendant to concurrent prison terms of 15 to 40 years for the first-degree CSC conviction, and 10 to 15 years for each of the second-degree CSC convictions. Defendant appeals as of right. We affirm.

Defendant first argues that this case should be remanded so that he may move for a new trial based on expert evidence that he claims indicates the complainant's mother may not have accurately recalled the initial conversation in which the complainant apparently first told her that defendant had inappropriately touched her. We disagree.

In determining whether to remand we can consider whether defendant has shown that the issue is meritorious. *People v Hernandez*, 443 Mich 1, 15; 503 NW2d 629 (1993), abrogated in part on other grounds *People v Mitchell*, 454 Mich 145 (1997). Defendant essentially argues that he has an appropriate basis to ask the trial court to grant a new trial under MCL 770.1, which provides:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.

Contrary to defendant's argument there is simply no reasonable basis to conclude that the evidence he relies on with regard to this issue would have altered the jury's verdict or indicates

that justice was not done in this case. The evidence relied on by defendant arguably provides some basis to question the accuracy of the memory of the complainant's mother with regard to the conversation in which the complainant initially indicated that she was inappropriately touched by defendant. But in itself this would not undermine the central evidence against defendant at trial, specifically the complainant's own testimony describing defendant having perpetrated sexual acts on her.[1] Defendant states in conclusory fashion that the evidence in question undercuts the reliability of the complainant's testimony. To the extent defendant is attempting to indicate that the complainant's mother may have somehow inappropriately suggested to her that defendant had sexually molested her, that matter was explored at trial. A defense expert testified to concerns that the complainant's mother's questioning of the complainant may have been inappropriately suggestive, while a prosecution expert testified that there was no research to indicate that "8, 9, and 10-year-old children are anymore suggestible than the age group that you are and I are in," i.e., there was no research indicating children of that age are more suggestible than adults. Specifically with regard to this case the prosecution expert also testified that in one of the tape-recorded conversations the complainant's mother asked the complainant a suggestive question in essentially asking her if defendant had vaginally penetrated her, but that the complainant's negative response to that question indicated that she was not suggestible. Obviously, the jury's verdict reflects that it concluded that the complainant's allegations against defendant were not the result of improper suggestibility. Defendant has not established a reasonable basis for a remand based on this issue.

Defendant also argues that he is entitled to a remand to move for a new trial based on a claim of ineffective assistance of counsel. We disagree because defendant failed to timely file any affidavit or offer of proof in support of the motion to remand as required by MCR 7.211(C)(1)(a).

Defendant next argues that the trial court erred in admitting evidence of defendant's alleged suicide attempt that occurred after the disclosure of the sexual assault allegations by his stepdaughter. Although defendant filed a pretrial motion to suppress the evidence of his alleged suicide attempt, it does not appear that the motion was heard and decided by the trial court. Thus, this argument is without merit. Nevertheless, the prosecution did not attempt to introduce evidence of the suicide attempt at trial. Plaintiff did attempt to elicit testimony as to defendant's "behavior after the disclosure [of the sexual assault allegations] c[ame] forward" from the complainant's mother (who was also defendant's wife). The trial court ultimately sustained defendant's objection to the relevance of the testimony and ordered the jury to disregard it. Defendant has demonstrated no prejudice as a result of the trial court's ruling.

Next, defendant argues that the lower court erred in denying the admission of testimony as to whether he fit the "profile" of a sex offender. We disagree.

[1] Further, the study relied on by defendant involved preschool children. Given that the complainant was nine years old at the time of the relevant conversation that study seems inapposite.

We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, when decisions regarding the admission of evidence involve preliminary questions of law, it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.*

At trial, the defense proffered the testimony of Dr. Michael Abramsky, who the court recognized as an expert in the field of clinical forensic psychology. Dr. Abramsky testified that he had interviewed defendant on nine occasions and had conducted two standardized diagnostic tests in order to determine "characterological deviance." Plaintiff objected to the line of questioning, and the trial court ultimately held that the "witness may not testify … that the defendant does not fit a drug—the sex offender drug [sic] profile, he is permitted, however, to tell the jury if the Court finds relevant what the profile for a sex offender is."

This Court recently addressed the issue of whether a defendant may introduce expert testimony to establish that he does not fit the "profile" of a sex offender once testimony describing such a profile has been introduced. In *People v Dobek*, ___ Mich App ___; ___ NW2d ___ (Docket No. 264366, issued January 30, 2007), slip op p 18, the defendant proffered the expert testimony of a retired professor of psychology and licensed psychologist. Like in the present case, the expert testified that he had performed a series of psychological tests on the defendant, who had been charged with various sex offenses. *Id.* On the basis of the test results, the expert opined that the defendant did not fit the profile of a sex offender. *Id.*

This Court affirmed the trial court's exclusion of defendant's proffered evidence, concluding that:

> [The expert's] proffered testimony regarding defendant's sex offender profile as developed from psychological testing was not sufficiently scientifically reliable, nor supported by sufficient scientific data, such that . . . [the expert] should have been allowed to testify. Further, the proffered evidence would not assist the trier of fact to understand the evidence or determine a fact in issue; rather, any arguable probative value attached to the evidence would be substantially outweighed by the danger of unfair prejudice to the prosecution, confusion of the issues, or misleading the jury. [*Id.* at 19.]

The Court reasoned that such testimony would come "dangerously close" to an expert opinion that the defendant is not a sex offender. *Id.* at 22. Moreover, the Court noted that such expert testimony has been almost universally rejected in other jurisdictions that have considered the issue. *Id.* at 23-24. Thus, the trial court here did not err in denying the admission of defendant's expert witness's testimony that defendant did not fit the "profile" of a sexual offender.

Next, defendant asserts that the lower court erred in allowing the prosecution to offer the rebuttal testimony of social worker Amy Allen over defendant's objection. We disagree.

Generally, "[r]ebuttal evidence is admissible to 'contradict, repel, explain, or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996), quoting *People v DeLano*, 318 Mich 557, 570; 28 NW2d 909 (1947).

Defendant proffered the testimony of Dr. Katherine Okla, whom the court qualified as "an expert witness in the field of clinical psychology." Okla testified that she had reviewed the notes taken during the Care House interview of the complainant, the police records, the transcript of the preliminary examination in the case, and the recorded conversations between the complainant, the complainant's mother, and defendant. Okla testified that, in her "professional opinion," there were potential negative issues associated with the questioning of the complainant by her mother that "very likely tainted [the complainant's] report" of the alleged inappropriate contact with defendant. Similarly, Okla testified that there were "big problem[s]" with the interview of the complainant at Care House, including the fact that it was not audio or video recorded, which hindered the "getting [of] unbiased information from a child."

Plaintiff moved to call Allen to "rebut[ ] the testimony provided by Dr. Okla regarding the issues and concerns of the suggestibility of the questions asked by the mom to the child in the taped interview." Allen was employed as a case manager and forensic interviewer at the Child Abuse Neglect Council in Oakland County, which is commonly referred to as Care House. Allen further testified that she had conducted about 4,000 forensic interviews of children aged 2 to 18 as well as of developmentally delayed adults and that she possessed bachelor degrees in psychology and in behavioral sciences. She testified that, after listening to the recorded conversation between the complainant and her mother and reviewing the accompanying transcript, she found only "[o]ne" question and answer during the mother's questioning of the complainant that could be "troubling to the point where it may … have been suggestive and infected the suggestibility of a child." Allen also testified, upon cross-examination, to specific details of her Care House interview with the complainant, including her belief that the governing protocol did not require the taping of interviews.

The rebuttal testimony of Allen was properly responsive to evidence produced by defendant, specifically the testimony of Dr. Okla. Although defendant insinuates that the trial court's admission of the evidence was error because the testimony could have been offered during the prosecutor's case in chief, this is not the test for whether rebuttal evidence is properly admitted. Rather, our Supreme Court has reasoned that "[a]s long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Figgures*, *supra* at 399. Because the evidence introduced by the prosecutor responded to evidence raised by defendant during direct examination, the trial court did not abuse its discretion in admitting the testimony of Allen during rebuttal.

Defendant next argues that the trial court erred in considering his "failure to accept responsibility" for the offense during sentencing. Because this issue is unpreserved we review it only for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Generally, "while a sentencing court cannot, in whole or in part, base its sentence on a defendant's refusal to admit guilt, evidence of a lack of remorse can be considered in determining an individual's potential for rehabilitation." *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987). In determining whether sentencing was improperly influenced by a defendant's failure to admit guilt, this Court is to consider three factors: "(1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence

would not have been so severe." *Id.* at 713. The presence of these factors indicates that a sentencing court was likely improperly influenced by a defendant's unwillingness to admit guilt. *Id.* However, if "the record shows that the court did no more than address the factor of remorsefulness as it bore upon defendant's rehabilitation, then the court's reference to a defendant's persistent claim of innocence will not amount to error requiring reversal." *Id.*

In this case, the sentencing court noted defendant's "unwillingness to accept responsibility" for the offense when determining the sentence to be imposed. From the record, it is unclear whether this was done in the context of defendant's potential for rehabilitation, which is clearly acceptable under the controlling case law. Further, none of the *Wesley* factors are present in this case. Specifically, defendant did not explicitly maintain his innocence during sentencing, and there is no indication in the record that the sentencing court attempted to persuade defendant to admit guilt or indicated that his sentence would have been lessened had he done so. Therefore, because this Court has noted that when none of the *Wesley* factors are present, resentencing is not required, see, e.g., *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003), we find that it was not plain error for the sentencing court to mention defendant's "unwillingness to accept responsibility" during sentencing.

Defendant also makes a cursory argument in his brief that the evidence proffered by Dr. Abramsky warrants remand by this Court for consideration by the trial court in resentencing. However, he has abandoned this issue by failing to include it in his statement of the questions presented and not citing any authority in support of his position. MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Therefore, we consider the issue waived. *Id.*

Finally, defendant argues in effect that the trial judge engaged in improper fact-finding in scoring the sentencing guidelines for the CSC I conviction in this case in violation of defendant's federal constitutional right to a jury trial under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree.

A trial court's fact-finding in connection with scoring the sentencing guidelines does not violate *Blakely* where it pertains only to the minimum sentence of a defendant's indeterminate sentence. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). In *Drohan* the defendant was convicted in relevant part of third-degree criminal sexual conduct, and the trial judge scored points for offense variables of the sentencing guidelines. *Id*. at 145. The defendant challenged the trial judge's use of facts not found by the jury beyond a reasonable doubt in connection with scoring the sentencing guidelines as violative of *Blakely*. *Id*. at 142-143. In rejecting that challenge our Supreme Court concluded that judicial fact-finding to set only the minimum sentence of an indeterminate sentence does not violate *Blakely*. *Id*. at 159-160. In this regard, the Court held that the "statutory maximum" a trial court could impose for purposes of *Blakely* in this context is the maximum sentence set by the statute defining the crime. Notably, under the base CSC I statute that crime is punishable by imprisonment for life or any term of years. MCL 750.520b(2).[2] The *Drohan* Court also expressly noted that where a crime is

[2] Subsequent to the trial court proceedings in this case MCL 750.520b(2) was amended, effective August 28, 2006, to add additional provisions related to sentencing for CSC I, but those (continued…)

punishable by life or any term of years "the imposition of *any* sentence is within the range authorized by that verdict" and, accordingly, "a trial court may utilize judicially ascertained facts to sentence a defendant to a term up to life imprisonment when life is the maximum sentence." *Drohan, supra* at 162 n 14 (emphasis in original). Thus, under *Drohan* the trial court's scoring of the sentencing guidelines where that pertained only to selecting the minimum term of defendant's sentence for CSC I did not violate *Blakely*.

We note that we do not rely on the statement in the main text of *Drohan* that "Michigan's sentencing scheme does not offend the Sixth Amendment." *Drohan, supra* at 143. A footnote placed at the end of that statement includes a qualification stating, "Because defendant here was not subject to an intermediate sanction, we decline to address whether and to what extent *Blakely* affects the intermediate sentencing scheme." *Id*. at 144 n 1. Thus, the broad statement in the main text of the opinion in *Drohan* cannot reasonably be considered to definitively hold that sentencing in Michigan is completely unaffected by *Blakely*. However, as in *Drohan* defendant in this case was not subject to an intermediate sanction under the sentencing guidelines. Specifically, an intermediate sanction is a sentence other than a prison sentence. MCL 769.31(b). Imposition of an intermediate sanction rather than a prison sentence is considered within the sentencing guidelines only in circumstances where the upper limit of the guidelines range is 18 months or less, the conviction is for an attempt to commit a class H felony, or the lower limit of the guidelines range is 12 months or less while the upper limit exceeds 18 months. MCL 769.34(a), (b), (c) (respectively). First-degree CSC is statutorily defined as a class A felony for purposes of the sentencing guidelines. MCL 777.16y. The lowest possible range under the sentencing guidelines for first-degree CSC, i.e., if no offense variable or prior record variable points were scored, is 21 to 35 months. MCL 777.62. Thus, because the lowest possible guidelines range for first-degree CSC does not contemplate imposition of an intermediate sanction the guidelines scoring in this case did not violate *Blakely* because it pertained only to the setting of the minimum term of defendant's indeterminate sentence for first-degree CSC.

Notably, in addition to criticizing *Drohan*, defendant also attacks the Michigan Supreme Court's opinion in *People v McCuller*, 475 Mich 176; 715 NW2d 798 (2006), vacated and remanded ___ US ___; 127 S Ct 1247; 167 L Ed 2d 62 (2007). Subsequent to the filing of the parties' briefs on appeal the United States Supreme Court vacated our Supreme Court's opinion in *McCuller* and remanded that case to our Supreme Court for further consideration. *McCuller v Michigan*, ___ US ___; ___ S Ct ___; 167 L Ed 2d 62 (2007). But the circumstances of *McCuller* are materially distinguishable from the present case, so that whether *Blakely* was violated in that case is immaterial to a proper resolution of the present issue. In *McCuller* the defendant was scored into a "straddle cell" of the sentencing guidelines for which either a prison term or an intermediate sanction would be within the guidelines and the defendant was sentenced to a prison term. *McCuller, supra* at 179 & n 1. Absent the scoring of certain offense variables by the trial judge the defendant would have been placed in a cell where the guidelines would require imposition of an intermediate sanction. *Id*. at 179 & n 2. The defendant argued that the

(…continued)

amendments are plainly inapplicable to this case since they were not in force at the times relevant to defendant's convictions.

trial judge violated *Blakely* by engaging in judicial fact-finding to score the offense variables and thereby increase his maximum sentence from an intermediate sanction to a prison term. *Id*. Whether fact-finding by a trial judge to score sentencing guidelines variables may violate *Blakely* where it has the effect of making the guidelines authorize imposition of a prison term where otherwise they would allow only an intermediate sanction is immaterial to this issue because, as discussed above, under any scoring of the sentencing guidelines for defendant's CSC I offense, the guidelines would require imposition of a prison term. Thus, the proper resolution of *McCuller* is immaterial to this case.

Affirmed.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey